

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Cape Breton Development Corporation v. Burrell*, 2003 NSCA 15

**Date:** 20030128

**Docket:** CA 161056

**Registry:** Halifax

**Between:**

Cape Breton Development Corporation(Workers'  
Compensation Board Claim Nos. 1078097, 1149179, 1154254,  
1243213. Amd 1270479; Workers' Compensation Appeal Tribunal  
Decision No. 99-1089)

Appellant

v.

Harold Burrell and The Nova Scotia Workers'  
Compensation Appeals Tribunal and The Workers'  
Compensation Board of Nova Scotia

Respondents

**Judges:** Roscoe, Chipman, Freeman, Bateman and Cromwell, JJ.A.

**Appeal Heard:** November 13, 2002, in Halifax, Nova Scotia

**Held:** Appeal allowed per reasons for judgment of Cromwell, J.A.;  
Chipman, Freeman, Roscoe and Bateman, JJ.A. concurring.

**Counsel:** Jane E. O'Neill and John D. Rice, for the appellant Cape Breton  
Development Corporation  
Anne S. Clark and Kenneth H. LeBlanc, for the respondent  
Burrell  
Louanne Labelle, for the respondent WCAT  
Paula M. Arab O'Leary and Madeleine F. Hearn, for the  
respondent, WCB

Reasons for judgment:

- [1] The respondent, Harold Burrell, was employed as a miner with the appellant from 1979 until his termination on March 3, 1987. He suffered five compensable injuries to his back between 1980 and 1985. In March of 1998, he was diagnosed with dysthymia (depression) and asked the Board to consider this as part of his compensable injuries. The Board’s case manager and hearing officer declined to do so because, in their opinion, the dysthymia could not reasonably be related to the compensable back injuries. However, the Workers Compensation Appeals Tribunal (“WCAT” or the “Tribunal”) allowed Mr. Burrell’s appeal, finding that the evidence established that the workplace likely contributed in part to Mr. Burrell’s condition. The appellant was granted leave to appeal to this Court. It is common ground that Mr. Burrell’s right to compensation is governed by the **Government Employees Compensation Act**, R.S.C. 1985, c. G-5 (“**GECA**”).
- [2] The appeal raises three main issues, which I would define as follows:
1. Does the Court have jurisdiction to hear and decide this appeal?
  2. Did the Tribunal err in law by failing to address whether Mr. Burrell was entitled to compensation under the provisions of **GECA**?
  3. Did WCAT commit reviewable error in concluding that the record established that Mr. Burrell’s dysthymia was a personal injury by accident arising out of and in the course of employment?
- [3] This case is governed by **GECA**. As in the case of **Thomson v. Workers’ Compensation Board (N.S.)**, 2003 NSCA 14, a question arises as to the jurisdiction of the Court in light of **Salloum v. Workers’ Compensation Appeals Tribunal (N.S.)** (2001), 190 N.S.R. (2d) 77. For the reasons given in **Thomson**, released concurrently, I would conclude that the Court has jurisdiction to hear the appeal.
- [4] The second issue is whether WCAT erred by failing to address entitlement under **GECA** but instead, and in error, dealt exclusively with the entitlement provisions of the Nova Scotia **Workers’ Compensation Act**, S.N.S. 1994-95, c. 10. (“**WCA**”)
- [5] At no point in its reasons does WCAT refer to **GECA**. That of itself is not a reviewable error. However, in light of the basis upon which the Tribunal concluded that Mr. Burrell’s dysthymia was compensable, the Tribunal did

- err in failing to advert to the different provisions respecting entitlement in **GECA** as compared with the comparable provisions in the **WCA**.
- [6] As noted by WCAT, Mr. Burrell sought a finding that his psychiatric condition was “... related to the workplace or the compensable accidents ...”. (emphasis added) I understand this to mean that his claim was that either the nature of the employment itself or the compensable injuries contributed to his dysthymia. The Tribunal noted that while Mr. Burrell’s claim had originally been denied on the basis that the psychological condition was not caused by his back injuries, that was not necessarily the issue to be determined. The Tribunal referred to “...medical opinion that the nature of the workplace itself (underground work) could have some affect on [Mr. Burrell’s] symptoms.” (Emphasis added) In allowing the appeal, WCAT stated that “... there is evidence that the workplace may also be a contributing cause to the Appellant’s condition.” (Emphasis added) This I take to be a finding that the nature of the workplace itself, as opposed to the compensable back injuries which he suffered at work, contributed to Mr. Burrell’s dysthymia.
- [7] As pointed out by the respondent, there can at this point be no question that the five back injuries suffered by Mr. Burrell at work constitute personal injury by accident arising out of and in the course of employment within the meaning of the virtually identical provisions in this regard found in s. 4(1)(a)(i) of **GECA** and s. 10(1) of **WCA**. It follows, therefore, that as regards the question of whether the back injuries contributed to the dysthymia, WCAT’s failure to advert specifically to **GECA** as opposed to **WCA** gave rise to no error.
- [8] The situation is different, however, with respect to the issue of whether the nature of the workplace itself contributed to the condition. With respect to this question, it is necessary to decide whether a condition (dysthymia) contributed to by the nature of the workplace falls within the definition of “personal injury by accident” (or perhaps “industrial disease”) as set out in **GECA**. The term “accident” in **GECA**, while not defined in the strict sense, is said in s. 2 to include “ a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause.” The term “accident” in **WCA** also includes similarly worded occurrences: s. 2. However, the **WCA** also includes, as a meaning of accident under s. 2(a)(iii), “... disablement ... arising out of and in the course of employment.” It is, therefore, arguably more apparent how a disabling psychiatric condition like dysthymia, which arises out of and in the course of

employment, could be found to be a “personal injury by accident” for the purposes of **WCA** than it would under **GECA**.

- [9] With respect, WCAT erred in law by failing to relate its factual conclusion that the nature of the workplace contributed to the dysthymia to the relevant statutory provisions in **GECA**. In light of the fact that WCAT did not address this aspect of the case, I would prefer not to opine further on what the result ought to be. This Court’s consideration of that question, if it comes before us, would no doubt be considerably assisted by a full and reasoned decision of WCAT on the point.
- [10] I would, therefore, find that WCAT erred in law by failing to address itself to the question of whether Mr. Burrell’s dysthymia is compensable under **GECA** and would remit the matter to WCAT for a new hearing. In light of that conclusion, it is not necessary to address the other issue raised on appeal.

Cromwell, J.A.

Concurred in:

Chipman, J.A.  
Freeman, J.A.  
Roscoe, J.A.  
Bateman, J.A.